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Bringing a Ninth Circuit appeal

THIS FEDERAL COURT RECEIVED 11,000 NEW APPEALS IN 2016 AND TERMINATED 12,000 PENDING CASES – SO LET'S SET YOUR EXPECTATIONS

For those less familiar with federal practice, bringing an appeal in the Ninth Circuit may seem downright daunting. Try not to let intimidation get the best of you. Many know the old saying that if you can read, you can cook. The same idea applies here. If you have found yourself successfully advocating on behalf of your clients in other courts, you have all the skills you need to pursue a Ninth Circuit appeal. The first step is to familiarize yourself with the requirements in the Ninth Circuit in order to avoid common pitfalls.

Knowing a bit more about the Ninth Circuit will help you manage your expectations about bringing an appeal in the largest of the thirteen federal courts of appeals, with jurisdiction over appeals from the nine western states plus Guam and the Northern Mariana Islands. (Map of the Ninth Circuit, <www.ca9.uscourts.gov/content/view.php?pk_id=0000000135>.)

In 2016, the Ninth Circuit received more than 11,000 new appeals and terminated nearly 12,000 pending cases. (U.S. Court of Appeals – Judicial Caseload Profile, http://cdn.ca9.uscourts.gov/datastore/general/2017/04/19/AO_9th_Year%20end_6years.pdf). In the same year, the median time from the filing of a notice of appeal until disposition was 15 months. (*Ibid.*) Certainly, the wheels of justice do turn slowly. But knowing the high volume of matters being filed and decided helps explain why it takes many months to get to resolution.

The 43 judges on the Ninth Circuit, 17 of whom have senior status, cannot issue an opinion (what the California Court of Appeal would call a "published opinion) in every single appeal. Instead, the judges often issue memorandum dispositions, or short, unpublished dispositions that have no precedential value. (Ninth Circuit Rule 36-3.) Using memorandum dispositions, also known as "memdispos," is by necessity: If Ninth Circuit judges issued an opinion in every single case, the median time an appeal awaits disposition would skyrocket.

While many advocates feel frustrated or disappointed when the Ninth Circuit resolves their appeal with a memorandum disposition, it ordinarily means only that the case did not involve a novel issue of law or facts requiring an opinion. (A memdispo could also signal that the panel agreed on the outcome but not on how to get there.) If you receive a memorandum disposition to resolve your case, do not despair. The panel of assigned judges still pored over the briefs, records and legal issues to come to what they consider a fair and thorough decision. However, if your case does involve any issues of first impression, inconsistent cases within the Circuit or splits with other federal courts of appeals, be sure to highlight that in your briefing. This information will help the Court decide whether to issue an opinion. Sometimes, the Court will issue a memorandum disposition as to some of the issues and an opinion as to others.

What, no oral argument?

Many attorneys also feel frustrated when the Ninth Circuit issues an order submitting a matter on the briefs without oral argument. (Fed. R. App. P. 34(a)(2).) Just as the Ninth Circuit cannot issue an opinion in every filed appeal, the court also cannot hear oral argument on every appeal. Because your case may be submitted on the briefs, however, you should use great care to present organized, cogent and thoughtful arguments in your opening and reply briefs. Those briefs may be your only opportunities to argue your position. Because you cannot count on the possibility of being able to make up for briefing shortfalls during oral argument, do not squander the opportunity afforded you in your briefs.

After briefing closes on your appeal, the Clerk's Office will randomly assign your case to a panel of three judges, either weeks or months before oral argument. During that time, each judge works together with her or his staff to review the case. Some judges share the analysis prepared in chambers with the other judges on the panel in advance of oral argument. Other judges prefer not to exchange any materials. This internal process remains one of personal preference to each judge.

The attorneys do not find out the panel assigned to their case until a week or so before oral argument. Thus, you cannot tailor your briefing to the judges assigned to your case, but you will have that opportunity as you prepare for oral argument. In preparing to argue your case, search for opinions written by the panel members in cases involving the same issue, procedural posture or standard of review. Watch some archived oral arguments, available on the Ninth Circuit website, to get a sense of how the panel members handle oral argument. Some judges always focus on the standard of review. Others often seem to know the record better than the lawyers appearing before them. Others like to engage the advocates in hypotheticals while others care about the pragmatic outcome of a case. Know your audience.

Ten guidelines to avoiding common mistakes

Now that you have some general background on how the Ninth Circuit works, you are ready to pursue your appeal. The best thing you can do is make your briefing the star of the show. These 10 guidelines will help you avoid common mistakes other practitioners make.

10. Avoid too much pre-briefing motion practice. You may find yourself tempted to engage in extensive pre-briefing motion practice. These motions may range from procedural motions to those for substantive relief. If you can, wait and bundle the motion with your brief. Before

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your case is assigned to a merits panel, the motions attorneys in the Office of Staff Attorneys process all motions filed in a case. (U.S. Court of Appeals for the Ninth Circuit, FRAP, Ninth Circuit Rules, Circuit Advisory Committee Notes, Court Structure and Procedures C(4)(c) (June 1, 2017) <http://cdn.ca9.uscourts.gov/datastore/uploads/rules/rules.htm.>.) Having the motion decided by the judges simultaneously considering the merits of your appeal ensures that the decision-maker with the most information will consider your motion. This outcome is preferable to a staff attorney handling your motion.

9. Check the Ninth Circuit Rules. Don't forget to check the Ninth Circuit Rules, which sometimes modify the rules in the FRAP. For instance, Federal Rules of Appellate Procedure: 32 caps opening briefs at 13,000 words, while Ninth Circuit gives you an additional 1,000 words. (Compare Fed. R. App. P. 32 with Ninth Cir. R. 32-1.) Failure to check the Circuit's rules can result in unforced errors. Some Ninth Circuit Rules require some interpretation, so avoid waiting until the last minute to review them. For example, Ninth Circuit Rule 30-1.5 states that "[t]he excerpts of record shall not include briefs or other memorandum of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor." (Ninth Cir. R. 30-1.5.)

Of course, many law clerks and judges find the briefing presented to the district court necessary to resolution of the issues before the Ninth Circuit, and you may not be certain what briefs to include until you write your brief. A good rule of thumb is that if you need to cite briefing or an exhibit filed in the district court in your opening brief filed in the Ninth Circuit, you should include those documents in the excerpts of record.

8. Use acronyms sparingly. Many cases will involve a statute commonly referred to by an acronym. Do not hesitate to use a well-known acronym in discussing that legislation. Use caution, however, in creating your own acronyms for parties, entities and other terms used throughout your brief. For readability and ease in understanding the issues, most judges and law clerks will appreciate the use of words instead. If you must use acronyms, do the Court a favor and create a key or table for the acronyms you create.

7. Know the standard of review and view your case through that lens. You may want to draft the section of the brief regarding the standard of review first so that you have the appropriate framework in mind as you approach your brief. If the Court is considering your appeal on de novo review, then you may want to avoid focusing too much on the district court's specific reasoning because the Ninth Circuit looks at it anew. If, however, the standard of review is abuse of discretion, the judge's specific decision and reasoning remain the focus of the question presented. Likewise, the Court roots review for substantial evidence in the record. Keep the standard of review in mind as you draft your brief and prepare for oral argument.

6. Skip paraphrasing an authority when a helpful direct quote will serve your needs. Sometimes, a jurist has already stated a proposition of law in a uniquely helpful and clear way. Recognize good writing and helpful quotes where they exist and use them. At the same time, do not take quoted material out of context. A careless or misleading use of quoted material will cause the Court to look at the remainder of your brief with skepticism.

5. Take the time to explain complicated concepts to the law clerk. Many lawyers practice every day in a particular area of law. Do not assume the judicial extern or law clerk reading your brief has the same familiarity or knowledge base. Take the time to craft a legal rule that sets forth the most important aspects of a legal principle and points the reader to sources that have not been abrogated in any respect.

4. Take great care in organizing your brief. Do not raise every single issue you lost on in the district court unless you have good reason to do so. Sometimes, you might raise an issue to highlight the injustice in your case, even if you think you will lose that issue ultimately. Other times, you may skip a definite loser of an issue in order to maintain credibility. Still others, you may take a shotgun approach because no one issue strikes you as particularly strong or weak, but you know the outcome below was wrong and you cannot determine which issue might grab the Court's attention. Whatever approach you take, try to make a conscious, reasoned and strategic decision about which issues you raise and in what order. Sometimes, the best argument occurs to you as you write your brief and that contention ends up buried toward the end. Make sure you give yourself time to edit the brief and to highlight the stronger issues as they reveal themselves in the writing process. Do not be afraid to change the order of issues as the strongest arguments become solidified in your writing.

3. Be specific about the remedy you want and ask for it. Sometimes, you may not know what you want the Court to do until you start writing your brief. Once you know what remedy you seek, ask for it. You may want the Court to reverse and remand with instructions to enter judgment for your client. Instead, you may want the Court to reverse and remand with instructions to reconsider an issue with briefing from the parties or in light of a particular piece of evidence not considered previously. If you want a specific remedy, be specific in requesting it.

Think through the consequences of your case. Will a particular outcome affect those beyond your client? Will the Court have concerns about result? If so, consider addressing that issue in your brief.

2. Be professional. Watch your tone. No judge or law clerk at the Ninth Circuit appreciates a snarky brief. Vigorous advocacy does not require crossing the line into being unprofessional. Try to write your brief so that the issues speak for themselves rather than describing an outcome as obvious or clear. If the issue were so evident, you would not be making a federal case out of it. Instead of saying, "Obviously, the record points to only one conclusion," say something like, "The record makes plain that the court did not consider this issue." In addition,

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do not play fast and loose with the facts. Make sure all of your factual propositions have support in the excerpts of record. Where the record requires an inference in order to support the contention you are making, say so.

1. Take control of the narrative. The opening brief gives you the opportunity to set the stage for your appeal. Spend some time figuring out what your case is really about. Why should the Court care about your client or the issues presented? Once you figure out what drives the case, take the time to tell that story, starting with the introduction and taking it through to the conclusion. Do not assume the Court conceptualizes the case the same way you do. Tell the judges how you view the case and why they should as well. Let this framework guide your preparation of the excerpts of record as well. Do not take a few pages out of context. Rather, provide the panel enough information to see your story in the evidence presented.

The key to a successful Ninth Circuit appeal does not differ in significant respects from the litigation at any other stage of a case. Do your homework, familiarize yourself with the applicable procedure and create a professional and careful product that tells your client's story.

MaryBeth LippSmith is the founder of LippSmith Law *in Los Angeles, where she specializes in appeals. She served as a term law clerk to the Honorable Dorothy W. Nelson on the Ninth Circuit Court of Appeals from 2002 to 2003 and as her career law clerk from 2011 to 2015. You can reach her at marybeth@lippsmithlaw.com.*